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No. 02-479

In the

Supreme Court of the United States

MEDICAL BOARD OF CALIFORNIA,

Petitioner,

v.

MICHAEL J. HASON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF MATTHEW KIMAN AND JOSEPH POPOVICH AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTEREST OF THE AMICI[1]

Amici Matthew Kiman and Joseph Popovich are plaintiffs in pending cases brought, *inter alia*, under Title II of the Americans with Disabilities Act of 1990. Kiman, who has amyotrophic lateral sclerosis (ALS), was denied various accommodations to his medical and sanitary needs while incarcerated in a New Hampshire state prison. See *Kiman* v. *New Hampshire Dept. of Corrections*, 301 F.3d 13, 15-16, *vacated on grant of rehearing en banc*, 310 F.3d 785 (1st Cir. 2002). The First Circuit has stayed proceedings in Kiman's appeal pending this Court's resolution of this case. See *Kiman* v. *New Hampshire Dept. of Corrections*, 311 F.3d 439 (1st Cir. 2002). Popovich, who has a hearing impairment, was denied hearing assistance during judicial proceedings concerning the custody of his daughter. See *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 811 (6th Cir.), cert. denied, 123 S. Ct. 72 (2002). Popovich's case is currently pending before the District Court for the Northern District of Ohio. See *id.* at 818 (remanding for new trial). The New Hampshire prison system's treatment of Kiman, and the Ohio court system's treatment of Popovich, implicate constitutional considerations that are quite distinct from those implicated by California's denial of a medical license to respondent Michael Hason. Kiman and Popovich are concerned that Hason's case not become a vehicle for this Court to speak broadly on Congress's authority to enact Title II as it applies to the wide range of cases that are very different from Hason's.

SUMMARY OF ARGUMENT

This case presents the question whether Congress properly exercised its authority to enforce the Fourteenth Amendment when it adopted Title II of the Americans with Disabilities Act of 1990. Petitioner directly challenges the constitutionality of 42 U.S.C. § 12202, which abrogates state sovereign immunity in suits brought under the ADA. The case thus implicates "the gravest and most

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[1] Written consents from all parties have been filed with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* and their counsel, made a monetary contribution to the preparation or submission of this brief.

delicate duty that this Court is called on to perform," *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)—the duty to decide whether Congress, a coordinate branch of government, has acted within its powers. We agree with respondent that Congress did not exceed its authority here, and we urge this Court to affirm the judgment of the court of appeals. We are concerned, however, that a number of lower courts that have addressed the constitutionality of Section 12202's abrogation of state sovereign immunity have proceeded in a manner that is inconsistent with fundamental principles of judicial restraint. By focusing on ADA Title II as a whole, and asking whether Congress had a sufficient Fourteenth Amendment basis for adopting that statute in *all* of its applications, these courts have imposed on plaintiffs the intolerable burden of defending the constitutionality of the statutory abrogation as it might apply to fact patterns far removed from the facts of their own particular cases. Such a facial analysis disregards this Court's precedents, as well as Congress's expressed intent to "invoke the sweep of congressional authority" in enacting the ADA. 42 U.S.C. § 12101(b)(4). In deciding this case, the Court should reaffirm its longstanding rule that a statute's constitutionality must be evaluated on an as-applied basis, and it should reject the approach of those courts that have considered the constitutionality of Title II as a whole.

This Court has repeatedly emphasized that a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). The Court has applied that principle not just in cases where Congress was alleged to have violated protected individual rights, but also in cases (like the present one) in which Congress was alleged to have exceeded its affirmative power to enforce the Civil War Amendments. See *United States* v. *Raines*, 362 U.S. 17, 20-26 (1960); *Griffin* v. *Breckenridge*, 403 U.S. 88, 104-107 (1971). There is nothing in the "congruence and proportionality" test enunciated in *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997), this Court's body of cases applying *City of Boerne*, or the language of Title II that justifies a departure from this longstanding rule here. To the contrary, this Court's previous application of *City of Boerne*

to the ADA, in *Board of Trustees* v. *Garrett*, 531 U.S. 356 (2001), employed an as-applied analysis that was very much in line with the *Salerno* rule.

Applying that rule here, Congress's abrogation of state sovereign immunity in suits under Title II cannot be deemed invalid on its face. For there plainly exist numerous circumstances under which application of the statute is congruent and proportional to actual or threatened violations of the Fourteenth Amendment. In a wide range of areas of state government—including incarceration and other involuntary institutionalization, elections, and the judicial process—Congress acted against the backdrop of widespread constitutional violations by states, violations that were frequently confirmed by judicial rulings, and it adopted rules that go only slightly if at all beyond what the Constitution itself requires. Even if, as some lower courts have held, some of Title II's requirements lack congruence and proportionality as applied to *other* areas of state government, there is no justification for striking the statute's abrogation of state sovereign immunity on its face.

Because Title II is, on its face, proper Section 5 legislation, the relevant question before this Court is whether application of Title II to the facts of this case satisfies the congruence and proportionality test. Respondent's *pro se* complaint can fairly be construed as alleging that petitioner rejected his license application solely out of prejudice and without any rational basis. Because such conduct violates the Equal Protection Clause, see *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985), the application of Title II to that conduct is congruent and proportional to an actual violation of the Fourteenth Amendment.

ARGUMENT

I. This Court's Proper Focus Is On The Application Of ADA Title II To The Parties And Circumstances Of This Case

Article III of the United States Constitution gives federal courts authority to review the constitutionality of an Act of Congress "only when the justification for some direct injury

suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy." *Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923). As this Court has long made clear, that authority is "little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right." *Ibid.* Applying these principles, the only proper issue before the Court is whether the ADA's abrogation section, 42 U.S.C. § 12202, is valid "as applied to *this* party in the circumstances of *this* case." *City of Chicago* v. *Morales*, 527 U.S. 41, 74 (1999) (Scalia, J., dissenting).

Notwithstanding these basic limitations on federal-court jurisdiction, a number of lower courts addressing the abrogation of state sovereign immunity in Title II cases have proceeded as if their duty was to consider the constitutionality of the statute as a whole and in the abstract. See, *e.g.*, *Dare* v. *California*, 191 F.3d 1167, 1175-1176 (9th Cir. 1999) (upholding Title II "as a whole" as proper Section 5 legislation and refusing to entertain state's as-applied challenge to the statute's constitutionality because "Fourteenth Amendment analysis" of a statute should not be conducted "in a piecemeal manner"), cert. denied, 531 U.S. 1190 (2001). Evaluating Title II globally in the broad sweep of its applications, rather than as applied to the specific facts of the particular cases before them, a number of these courts have struck down the statute's abrogation of state sovereign immunity on its face. See, *e.g.*, *Wessel* v. *Glendening*, 306 F.3d 203, 207-208 (4th Cir. 2002) (where plaintiff's claim "arises directly under Title II," rather than under a specific regulation implementing the statute, Section 5 analysis must consider Title II as a whole); *Thompson* v. *Colorado*, 278 F.3d 1020, 1028 n.4 (10th Cir. 2001) (holding that it is appropriate to "conduct the abrogation analysis by considering Title II in its entirety" and concluding that the statute as a whole exceeds Congress's Section 5 power), cert. denied, 122 S. Ct. 1960 (2002). As petitioner (Pet. Br. 15)—but

not its *amicus*[2]—appears to recognize, such a facial analysis disregards this Court's well-established jurisprudence.

A. A Facial Challenge Is Generally Improper Unless "No Set Of Circumstances" Exists Under Which The Statute Would Be Valid

The Court has repeatedly emphasized that a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *E.g., Salerno*, 481 U.S. at 745. This rule rests on fundamental notions of judicial restraint. Where a statute is constitutional as applied to the facts before the court, it would be inconsistent with the judicial role to conjure up other possible sets of facts as applied to which the statute might be unconstitutional. "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined." *Raines*, 362 U.S. at 22. And where the court concludes that an application of a particular statute is unconstitutional, judicial restraint even more strongly counsels that the court proceed cautiously. "A ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary." *Regan* v. *Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion).

The Court applied these principles in *United States* v. *National Treasury Employees Union*, 513 U.S. 454 (1995). There, the Court held that a federal statute that barred any "Member, officer, or employee" of the federal government from receiving honoraria violated the First Amendment. *Id.* at 459 (quoting statutory text). But the Court limited its holding "to the parties before the Court," who included only relatively low-level executive branch employees, *id.* at 477-478. Because "the government conceivably might advance a different justification for an honoraria

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[2] See Va. Br. 9-13 (citing *Wessel* and *Thompson* and arguing that Title II as a whole exceeds Congress's Section 5 power).

ban limited to more senior officials," the Court left the ban intact as it applied to those officials. *Id.* at 478.[3]

The Court has not limited *Salerno*'s principle of judicial restraint to cases like *Salerno* and *National Treasury Employees Union*, in which Congress was alleged to have violated protected individual rights. The Court has applied that principle as well in cases like the present one, in which Congress was alleged to have exceeded the scope of its affirmative power to enforce the Civil War Amendments. *Raines*, *supra*, is a classic example. That case involved the constitutionality of a provision of the Civil Rights Act of 1957, which authorized the United States to bring an injunctive action against "any person" who interfered with protected voting rights. 42 U.S.C. § 1971(c). The federal government had brought such an action against state election officials, who argued that the statute exceeded Congress's authority to enforce the Fifteenth Amendment. A three-judge district court agreed. That court read the statute's "any person" language as "allow[ing] the United States to enjoin purely private action designed to deprive citizens of the right to vote on account of race or color." *Raines*, 362 U.S. at 20. And it concluded that the statute, as so construed, extended beyond Congress's power to enforce the Fifteenth Amendment because it transgressed that Amendment's limitation to discriminatory *state* action. See *ibid.*

This Court reversed. The district court's facial analysis, this Court concluded, disregarded two basic limitations on judicial review of the constitutionality of statutes: "'one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id.* at 21 (quoting *Liverpool, N.Y., & Phila. S.S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39

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[3] Four Justices would have gone even further and limited the holding of unconstitutionality not just to the *parties* before the Court but also to the *type of conduct* before the Court—government employees' receipt of honoraria "for speech without nexus to Government employment." *Id.* at 485-489 (O'Connor, J., concurring in the judgment in part and dissenting in part); accord *id.* at 501-503 (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting).

(1885)). Accordingly, the district court's proper focus should have been on the particular application of the Civil Rights Act of 1957 involved in the case before it: "if the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality." *Id.* at 24-25. Because the complaint alleged conduct Congress clearly had power to prohibit under the Fifteenth Amendment—racial discrimination by state officials—the district court should "have gone no further and should have upheld the Act as applied in the present action." *Id.* at 26.

The Court applied a similar analysis in *Griffin*, *supra*. There, the Court interpreted 42 U.S.C. § 1985(3)[4] as applying to wholly private conspiracies, so long as they are motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus," and they "aim at a deprivation of the equal enjoyment of rights secured by the law to all." *Griffin*, 403 U.S. at 102. In deciding whether the statute as so construed was a proper exercise of congressional authority, the Court recognized that such a broad prohibition of private conspiracies might have applications that went beyond Congress's power to enforce the Civil War Amendments. See *id.* at 104. But it noted that cases like *Raines* had "long since firmly rejected" the "rule that required invalidation of an entire statute if any part of it was unconstitutionally overbroad." *Ibid.* Instead, the Court concluded, the proper inquiry "need go only to identifying a source of congressional power to reach the private conspiracy alleged by the complaint *in this case*." *Ibid.* (emphasis added). Because Congress clearly had authority under the Thirteenth and Fourteenth Amendments to reach the conduct alleged in the case before it (a private conspiracy to attack an out-of-state vehicle belonging to an African-American who was believed to be a civil rights worker, see *id.* at 89-90), the Court found "no occasion . . . to trace out [the statute's] constitutionally permissible periphery." *Id.* at 107.

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4. Section 1985(3) provides a remedy where injury results when "two or more persons . . . conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws." 42 U.S.C. § 1985(3).

B. There Is No Basis for Permitting An Exception To The General Rule Here

Under the principle articulated in *Salerno*, as applied in *Raines* and *Griffin*, a state cannot establish that Section 12202's abrogation of state sovereign immunity in Title II cases is facially unlawful unless it can show that the statute *in all of its applications* exceeds Congress's authority. The lower-court cases that have applied a facial analysis to Title II claims have suggested three reasons for departing from the *Salerno* rule here: (1) that the requirement of "congruence and proportionality," *City of Boerne*, 521 U.S. at 520, is simply not capable of being applied in a case-by-case manner; (2) that this Court's cases applying the "congruence and proportionality" test—and particularly *Garrett*—have declined to engage in an as-applied analysis; and (3) that because the operative section of Title II applies to all "public entities" without making any textual distinction among them, a finding that the statute exceeds Congress's authority as applied to any one public entity necessarily infects the entire section. These arguments do not justify a departure from the settled *Salerno* rule.

1. *Congruence And Proportionality Analysis May Properly Be Approached On An As-Applied Basis*—There is nothing inherent in *City of Boerne*'s "congruence and proportionality" test that would make the *Salerno/Raines/Griffin* rule inapplicable. After all, the basic question addressed in *Boerne* was the same question addressed in *Raines* and *Griffin*: Was this enactment within the scope of Congress's power to enforce the Civil War Amendments? And it is certainly intellectually coherent to evaluate whether a particular *application* of a congressional enactment is congruent and proportional to an actual or threatened violation of constitutional rights. Indeed, the wide-ranging coverage of ADA Title II almost compels such an inquiry. As petitioner notes, "Title II encompasses an array of qualitatively different governmental activities within the broad phrase, 'services, programs, or activities.'" Pet. Br. 14. Although the Court might conclude that the record of unconstitutional state disability-based discrimination is sufficiently strong to justify Title II in all of its applications, both the actual substantive obligations imposed by the statute and the constitutional predicates for imposing those

obligations are likely to vary widely across different areas of state government operations. Cf. *National Treasury Employees Union*, 513 U.S. at 478 (refusing in case brought by lower-level executive branch employees to consider constitutionality of statutory honoraria ban as it would apply to senior executive branch officials, because such an application would "presen[t] a different constitutional question than the one we decide today"). For example, although it is generally true that "States are not required to make special accommodations for the disabled," *Garrett*, 531 U.S. at 367, in some areas of state government (such as the operation of prisons and mental institutions, the conduct of elections, and judicial proceedings) the Fourteenth Amendment has been held to require some forms of accommodation. See part I-C, *infra*. The Section 5 basis for applying Title II's accommodation requirement will obviously be much stronger in those areas than in areas where, as in employment, any accommodations "have to come from positive law." *Garrett*, 531 U.S. at 368.

In some cases the specific state action challenged under Title II will itself violate the Constitution. The challenged action may, for example, constitute irrational discrimination like the discriminatory zoning decision in *City of Cleburne*, *supra*. Or, as in the suits brought by *amici* Kiman and Popovich, the challenged action may consist of the failure to provide accommodation in those specific circumstances in which the Fourteenth Amendment imposes a duty to accommodate. See *Popovich*, 276 F.3d at 815 (because Due Process Clause requires state to provide hearing assistance to hearing-impaired parent in child custody hearing, Title II is congruent and proportional as applied in parent's suit challenging denial of such assistance); *Kiman*, 301 F.3d at 25 (because denial of cane, shower chair, and accessible toilet to inmate with ALS would violate the Cruel and Unusual Punishments Clause as incorporated in the Fourteenth Amendment, Title II is congruent and proportional as applied in inmate's suit challenging that denial). Application of Title II to such cases is perfectly congruent and proportional to a constitutional violation. In such cases, the statute does not add any additional *substantive* requirements to those imposed by the Fourteenth Amendment. But the statutory abrogation of state sovereign immunity has important *procedural* consequences, because the Fourteenth Amendment does

not of its own force abrogate Eleventh Amendment immunity. See *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989).

This Court's *Boerne* line of cases makes clear, however, that Congress has power to reach more than just those instances where the defendant's conduct itself violates the Fourteenth Amendment. "Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence." *Garrett*, 531 U.S. at 365. In each of the areas of state government operations we address in part I-C of this brief, the requirements imposed by Title II come extremely close to the requirements imposed by the Constitution itself. Although the statutory and constitutional standards of liability are not identical, Title II's additional margin of protection is justified by a long record of state constitutional violations in these areas—a record typically backed up by "confirming judicial documentation," *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring). In each of these areas of state government, the application of Title II is so closely tied to actual or threatened constitutional violations as to satisfy the congruence and proportionality test—even if the statute's mandates in these areas go somewhat beyond what the Constitution compels. See *City of Boerne*, 521 U.S. at 518 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'") (quoting *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976)); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 81 (2000) ("Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.").

Where, as in the contexts we discuss in section C, application of Title II would be congruent and proportional to an actual or anticipated constitutional violation, it should, as in *Raines* and *Griffin*, make no difference that *other* applications of the statutory language might extend beyond the sweep of Congress's enforcement power. For example, a number of lower courts have ruled that the application of Title II to prohibit states from charging

a nominal fee for handicapped parking placards exceeds Congress's Section 5 authority because *that specific application* of the statute lacks congruence and proportionality to any actual or threatened constitutional violation. See, *e.g.*, *Neinast* v. *Texas*, 217 F.3d 275, 282 (5th Cir. 2000), cert. denied, 531 U.S. 1190 (2001); *Brown* v. *N.C. Div. of Motor Vehicles*, 166 F.3d 698, 707-708 (4th Cir. 1999), cert. denied, 531 U.S. 1190 (2001). Even if those decisions are correct, it would be nonsensical to say that Title II's lack of congruence and proportionality in *that* application has any bearing on the constitutionality of applying Title II and the accompanying abrogation of state sovereign immunity in other areas of state government where there is a strong predicate of past and threatened constitutional violations. Such a result would impose on litigants and courts the "'undesirable'" burden of "'consider[ing] every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.'" *Raines*, 362 U.S. at 21 (quoting *Barrows* v. *Jackson*, 346 U.S. 249, 256 (1953)).

Nor does a claim that Congress has exceeded its Section 5 powers represent one of the narrow constitutional contexts in which this Court has permitted a party to challenge a statute on its face based on potential applications that go beyond the conduct in which that party has engaged. The Court has so departed from the *Salerno* principle only in contexts where the mere presence of an overbroad statute on the books could have a significant chilling effect on protected activity. See, *e.g.*, *New York* v. *Ferber*, 458 U.S. 747, 767-769 (1982) (First Amendment overbreadth doctrine); *Fargo Women's Health Org.* v. *Schafer*, 507 U.S. 1013, 1013 (1993) (O'Connor, J., concurring) (Fourteenth Amendment prohibition on imposing an undue burden on a woman's choice to have an abortion). Unlike in those contexts, limitations on Congress's Section 5 power do not define a sphere of protected primary conduct, for Congress can often reach the same state conduct under its other enumerated powers. See, *e.g.*, *Garrett*, 531 U.S. at 374 n.9 (although ADA Title I exceeds Congress's Section 5 authority, it "still prescribes standards applicable to the States"). And unlike private individuals, states are large and sophisticated entities that are fully capable of asserting their rights and are unlikely to be chilled by the presence on the federal statute books of a law that in some of its applications is disproportionate to actual

or threatened constitutional violations. If the Court were to rely on the existence of some overbreadth in Title II to strike down Section 12202's abrogation of state sovereign immunity on its face, the Court would frustrate Congress from regulating state conduct it plainly intended to and had the power to regulate. The result would be simply to punish Congress for sloppy drafting—a practice entirely inconsistent with the separation of powers. See Alfred Hill, *Some Realism About Facial Invalidation of Statutes*, 30 HOFSTRA L. REV. 647, 665-666 (2002).

2. Garrett *Employed An As-Applied Approach*—This Court's decision in *Garrett*, which examined the Fourteenth Amendment basis for ADA Title I's prohibition of employment discrimination, followed these principles. Although one lower court has described *Garrett* as having addressed the constitutionality of Title I "in its entirety," *Thompson*, 278 F.3d at 1027-1028 n.4, that is incorrect. To the contrary, the Court in *Garrett* expressly limited its constitutional analysis to Title I's application to cases, like the one before it, that implicated Section 12202's abrogation of state sovereign immunity—cases in which the defendants were *state governments* and the plaintiffs were private individuals who sought retrospective monetary relief. See *Garrett*, 531 U.S. at 368-369 (declining to consider Section 5 basis for applying Title I to "units of local government, such as cities and counties"); *id.* at 374 n.9 (noting that its decision did not reach cases in which the federal government sought to enforce Title I against the states, nor did it reach cases in which private parties sought prospective injunctive relief). And although Section 12202's abrogation of state sovereign immunity applies uniformly to both Title I and Title II, the Court invalidated that abrogation only as it applied to Title I. See *Garrett*, 531 U.S. at 360 n.1; see also *id.* at 371 n.7 (declining to consider evidence of unconstitutional state discrimination in public services, because that discrimination is addressed by Title II, and the case before the Court involved only employment discrimination and Title I).

To be sure, there is language in some post-*Boerne* cases that appears to discuss unconstitutional statutory applications that

were not specifically before the Court.[5] But nothing in the Court's *language* in these cases could overrule the *Salerno* principle as entrenched by the square *holdings* of *Raines* and *Griffin*. See *Alexander* v. *Sandoval*, 532 U.S. 275, 282 (2001) ("[T]his Court is bound by holdings, not language."). And in each of the post-*Boerne* cases, the Court has in fact made clear that the statute at issue lacked a proper Section 5 basis on the facts of the case before it.[6] In each of these cases, the lack of any good reason to believe that the challenged state conduct violated the Constitution—combined with the lack of any strong record of state constitutional

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[5] In *Boerne*, the Court supported its conclusion that the Religious Freedom Restoration Act lacked congruence and proportionality by noting that the statute "intru[ded] at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter," *City of Boerne*, 521 U.S. at 532, although the specific case involved a local zoning decision. In *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627 (1999), the Court supported its conclusion that the Patent Remedy Act lacked congruence and proportionality by noting that the statute did not require a showing of intent to infringe the plaintiff's patent, see *id.* at 645, although the case before the Court involved an allegation of intentional deprivation. See *id.* at 653-654 (Stevens, J., dissenting). And in *Garrett* itself, the Court supported its conclusion that ADA Title I lacked congruence and proportionality by noting that the statute requires physical modifications to workplace facilities and that it prohibits some practices that have a disparate impact on people with disabilities, *Garrett*, 531 U.S. at 372-373, although neither of these requirements was implicated by the facts of the case before the Court.

[6] In *Boerne*, the Court determined that because "numerous state laws, *such as the zoning regulations at issue here*, impose a substantial burden on a large class of individuals," it could not conclude that such regulations had purposely targeted religion merely because they imposed such a burden. *City of Boerne*, 521 U.S. at 535 (emphasis added). In *Florida Prepaid*, the Court observed that intentional infringement of patents by a state could not violate the Due Process Clause unless "the State provides no remedy, or only inadequate remedies, to injured patent owners," and it further noted that "the State of Florida provides remedies to patent owners for alleged infringement on the part of the State." *Florida Prepaid*, 527 U.S. at 642-644 & n.9. And in *Garrett*, the Court made clear both that the Fourteenth Amendment generally does not require states "to make special accommodations for the disabled" and that "adverse, disparate treatment" of people with disabilities does not in and of itself violate the Constitution. *Garrett*, 531 U.S. at 367, 370. But the plaintiffs had alleged nothing more than simple disparate treatment and the failure to accommodate. See *id.* at 362.

violations or other factors to justify Congress's adoption of a prophylactic rule[7]—dictated the Court's conclusion that the statutes at issue, *as applied to the plaintiffs and defendants before the court*, exceeded congressional authority. These cases thus do not—implicitly or explicitly—overrule the holdings of *Raines* and *Griffin* that the Court must approach Congress's exercise of its Civil War Amendment enforcement authority on an as-applied basis. To the contrary, they are entirely consistent with those holdings.

3. *Nothing In Title II's Language Requires A Facial Approach To The Statute's Constitutionality*—Nor is there anything in the language of Title II that would require the Court to evaluate the Section 5 basis for the statute on its face. In *Wessel*, the Fourth Circuit determined that because Title II applies equally to *any* "public entity" without distinguishing among different public entities, 42 U.S.C. § 12132, the court was bound to consider the constitutionality of the statute as it might apply to *all* such entities; the court could not limit its focus to the prison setting that was the context of the case before it. See *Wessel*, 306 F.3d at 207-208. The court concluded that "absent judicial redrafting of the statute, there is no narrower constitutional question to address" than the Section 5 basis for Title II as a whole. *Id.* at 208. But that conclusion is squarely inconsistent with *Garrett*. There, the Court limited its Section 5 analysis to Title I's application to state as opposed to local governments, see *Garrett*, 531 U.S. at 368-369, even though Title I by its terms applies equally to all "governments, governmental agencies, [and] political subdivisions," 42 U.S.C. § 2000e(a) (incorporated by reference in 42 U.S.C. § 12111(2), (5), (7)).[8] And although the ADA's abrogation of sovereign immunity

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[7] See *City of Boerne*, 521 U.S. at 530 ("RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."); *Florida Prepaid*, 527 U.S. at 640 ("In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."); *Garrett*, 531 U.S. at 370 (finding "minimal evidence of unconstitutional state discrimination in employment against the disabled").

[8] Compare Title II's definition of "public entity," which includes "any State or local government," as well as "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(A), (B).

appears in a single section of the statute that applies to all titles of the ADA in an undifferentiated manner, see 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter."), the Court held that section unconstitutional only as it applied to Title I. See *Garrett*, 531 U.S. at 360 n.1.

Garrett is hardly an anomaly in this respect. For "this Court has on several occasions declared a statute invalid as to a particular application without striking the entire provision that appears to encompass it." *National Treasury Employees Union*, 513 U.S. at 487 (O'Connor, J., concurring in the judgment in part and dissenting in part). The *National Treasury Employees Union* case provides a recent example. See *id.* at 477-478 (opinion of the Court) (holding the honoraria ban invalid only as applied to "Executive Branch employees below grade GS-16," although the relevant statute applied in an undifferentiated manner to any "Member, officer, or employee" of the federal government). *Raines* applied the same principle. Like Title II, the statute at issue in *Raines* applied to a broad and undifferentiated class of defendants—"any person" who infringed on protected rights—and the Court did not dispute the district court's conclusion that the statute's broad language would exceed congressional authority as applied to persons acting as purely private individuals. *Raines*, 362 U.S. at 19-20. But the Court concluded that, whatever the answer to the question of the statute's constitutionality as applied to private defendants, the constitutionality of the statute's application to state election officials must be considered on its own merits. For despite the statute's broad "any person" language, there was no reason to believe that Congress would have intended the entire statutory provision to fall if its application to one possible class of defendants exceeded the legislature's Fifteenth Amendment enforcement authority. See *id.* at 22-24. *Griffin* is to similar effect. See *Griffin*, 403 U.S. at 104, 107.

In holding that unconstitutional applications of broad and undifferentiated statutory language do not invalidate that language in its entirety, *Raines* and *Griffin* applied basic principles of statutory severability. See *Regan* v. *Time, Inc.*, 468 U.S. at 653

(plurality opinion) (observing that severability "is largely a question of legislative intent, but the presumption is in favor of severability."). Those principles are particularly apposite here, for Congress has made doubly clear that it did not intend for invalid applications of the ADA's abrogation of Eleventh Amendment immunity to scuttle that abrogation as a whole. Not only does the ADA contain the standard severability section, 42 U.S.C. § 12213, but the statement of purpose in the statutory text expressly declares Congress's intent to go as far as its power permits by "invok[ing] the sweep of congressional authority" to respond to disability-based discrimination, 42 U.S.C. § 12101(b)(4). Cf. *Toyota Motor Mfg., Kentucky, Inc.* v. *Williams*, 122 S. Ct. 681, 691 (2002) (relying on Section 12101's "findings and purposes" to interpret operative provisions of the ADA); *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 484-487 (1999) (same). To evaluate the Section 5 basis for Section 12202's abrogation of state sovereign immunity "by considering Title II in its entirety," *Thompson*, 278 F.3d at 1028 n.4, would be to disregard Congress's plainly expressed intentions on this question. This Court did not engage in such a broad-brush analysis in *Garrett*, and it should not do so here.

C. Because There Are Plainly Numerous Circumstances In Which Title II Is Valid Section 5 Legislation, Any Facial Challenge To The Statute's Abrogation Of State Sovereign Immunity Must Fail

Because the *Salerno* rule applies fully to a claim that Congress has exceeded its power to enforce the Civil War Amendments, lower courts that have held 42 U.S.C. § 12202's abrogation of state sovereign immunity under ADA Title II to be facially invalid cannot be right. For Section 12202 could be unconstitutional on its face only if "no set of circumstances" exists under which it would be valid. *Salerno*, 481 U.S. at 745. Petitioner and its *amicus* plainly cannot satisfy that heavy burden. Indeed, petitioner wisely disclaims any effort to shoulder that burden (Pet. Br. 15), for numerous circumstances exist in which the application of Title II to state conduct is congruent and proportional to actual or threatened violations of the Fourteenth Amendment. Without making any attempt to be exhaustive, the following subsections

identify four categories of such circumstances. In many of the instances discussed below, the conduct challenged under Title II also violates the Constitution, and the statute serves the limited but important purpose of abrogating state sovereign immunity. In others, the statute adds substantive obligations to those imposed by the Constitution, but it does so only as "reasonably prophylactic legislation." *Kimel*, 528 U.S. at 88.[9]

1. *Prison Conditions*—In *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 209 (1998), this Court held that Title II's text "unmistakably includes state prisons and prisoners within its coverage." Following *Yeskey*, a number of lower courts have applied Title II to cases in which prison officials, by failing to accommodate the medical or sanitary needs of inmates with disabilities, have caused injury. *Amicus* Matthew Kiman's case is paradigmatic. Kiman, who has amyotrophic lateral sclerosis, was incarcerated in a New Hampshire state prison. Prison officials denied him numerous accommodations for his condition, including a cane to permit him to exercise, a chair to keep him from repeatedly falling in the shower, and an accessible toilet to permit him to perform acts of personal hygiene without the assistance of his cellmates. See *Kiman*, 301 F.3d at 14-15; see also, *e.g.*, *St. Pierre* v. *McDaniel*, 172 F.3d 58 (9th Cir. 1999) (table)

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[9] Because this case involves the constitutionality of Section 12202's abrogation of state sovereign immunity only, our discussion in text is limited to classes of cases in which states themselves are likely to be defendants. There are, of course, numerous other applications of Title II in which plaintiffs challenge the decisions of local governments, who are not entitled to immunity. See *Garrett*, 531 U.S. at 369. Many of these applications have a valid Section 5 basis as well. For example, the application of Title II to discriminatory local zoning decisions is congruent and proportional to the significant record of unconstitutional zoning discrimination against people with disabilities—a record exemplified by this Court's decision in *Cleburne*, 473 U.S. at 450, and confirmed by a string of lower court cases, see, *e.g.*, *Horizon House Dev. Servs., Inc.* v. *Township of Upper Southampton*, 804 F. Supp. 683, 700 (E.D. Pa. 1992), aff'd, 995 F.2d 217 (3d. Cir. 1993); *Burstyn* v. *City of Miami Beach*, 663 F. Supp. 528, 533-537 (S.D. Fla. 1987); see also, *e.g.*, *Epicenter, Inc.* v. *City of Steubenville*, 924 F. Supp. 845, 853 (S.D. Ohio 1996) (ruling for plaintiff on statutory grounds); *Arc of New Jersey, Inc.* v. *New Jersey*, 950 F. Supp. 637, 648-649 (D.N.J. 1996) (same); *Sunrise Dev., Inc.* v. *Town of Huntington*, 62 F. Supp. 2d 762, 765 (E.D.N.Y. 1999) (same).

(reversing grant of summary judgment to defendant in Title II case alleging that denial of crutches to inmate denied him access to showers, recreation, meals, and medical facilities); *Hicks* v. *Armstrong*, 116 F. Supp. 2d 287, 289-290 (D. Conn. 1999) (denying motion to dismiss in Title II case involving inmate with paraplegia denied, *inter alia*, accessible shower and toilet facilities). The application of Title II to cases like Kiman's is plainly congruent and proportional to actual or anticipated violations of the Cruel and Unusual Punishments Clause of the Eighth Amendment, as incorporated in the Fourteenth Amendment.

This Court has held that the Eighth Amendment imposes on states an affirmative obligation to protect the health and safety of inmates. See, *e.g.*, *Estelle* v. *Gamble*, 429 U.S. 97, 103 (1976). Prison officials violate their constitutional duty to avoid "deliberate indifference to serious medical needs of prisoners," *id.* at 104, when they "ignore the basic needs of a handicapped individual or postpone addressing those needs out of mere convenience or apathy." *LaFaut* v. *Smith*, 834 F.2d 389, 394 (4th Cir. 1987) (Powell, J., sitting by designation). Applying these principles, a number of lower courts have found violations of the Eighth Amendment when state prison officials have failed to provide accommodation to the medical or sanitary needs of individuals with disabilities.[10]

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[10] See, *e.g.*, *LaFaut*, 834 F.2d at 394 (failure to provide appropriate toilet facilities and rehabilitation therapy to inmate with paraplegia violated Eighth Amendment); *Weeks* v. *Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) (denial of wheelchair to inmate with paralysis, resulting in inmate's inability to shower himself or leave his cell, violated Eighth Amendment); *Beckford* v. *Irvin*, 49 F. Supp. 2d 170, 180 (W.D.N.Y. 1999) (Eighth Amendment violation existed where plaintiff "was regularly deprived use of his wheelchair for extended periods of time, plaintiff was unable to shower, and . . . he was not allowed to use a cup in order to try to bathe by taking water out of his cell toilet or drinking fountain"); *Clarkson* v. *Coughlin*, 898 F. Supp. 1019, 1043 (S.D.N.Y. 1995) (denial of interpretive services and assistive devices to deaf inmates during medical treatment violated Eighth Amendment where "communication between the patient and medical personnel [was] essential to the treatment in question"); *Casey* v. *Lewis*, 834 F. Supp. 1569, 1582 (D.Ariz. 1993) (failure to provide accessible bathrooms, showers, and cells violated Eighth Amendment).

The prison conditions context is thus decisively unlike the employment context at issue in *Garrett*. While it is generally true that "States are not required by the Fourteenth Amendment to make special accommodations" for employees with disabilities, *Garrett*, 531 U.S. at 367, by incorporating the Eighth Amendment's Cruel and Unusual Punishments Clause the Fourteenth Amendment imposes a requirement that states accommodate those they confine. At least as applied to cases where a prisoner requests accommodations that relate to serious medical or sanitary needs, Title II's requirement of accommodation thus directly responds to actual or threatened violations of the Fourteenth Amendment. Where a prisoner requests accommodations under Title II, moreover, the determination whether that request is "reasonable" would necessarily take account of the special "institutional requirements"—including "[s]ecurity concerns, safety concerns, and administrative exigencies"—of the prison setting. *Love* v. *Westville Correctional Center*, 103 F.3d 558, 561 (7th Cir. 1996) (dicta). As such, the requirements of Title II will extend to only a limited degree beyond the requirements imposed by the Constitution itself. Given the "confirming judicial documentation," *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring), of extensive state violations of the Eighth Amendment in this context, see n. 10, *supra*, Title II's somewhat broader coverage is fully justified as "reasonably prophylactic legislation." *Kimel*, 528 U.S. at 88.

2. *Judicial Proceedings*—In numerous Title II cases, plaintiffs have sought accommodations to provide them access to and enable them to participate in judicial proceedings. The cases often follow one of two patterns. In the first, an individual with a disability who is a criminal defendant or a litigant in an especially important civil action such as one "involving state controls or intrusions on family relationships," *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 116 (1996), seeks an accommodation to enable him to participate meaningfully in the proceedings. In his pending case, for example, *amicus* Joseph Popovich contends that a state court violated Title II by denying him hearing assistance that would have enabled him to participate in a proceeding concerning custody of his daughter. See *Popovich*, 276 F.3d at 811; see also, *e.g.*, *Duvall* v. *County of Kitsap*, 260 F.3d 1124, 1135-1138 (9th Cir. 2001) (summary judgment for defendant inappropriate in Title II case brought by

hearing-impaired husband denied real-time transcription services at his marital dissolution hearing). Such an application of Title II is plainly congruent and proportional to an actual or threatened violation of the Fourteenth Amendment.

Participants in such especially important judicial proceedings have a constitutional right to be able to participate in and follow the case against them. See, *e.g.*, *Drope* v. *Missouri*, 420 U.S. 162, 171, 181 (1975) (holding that a criminal defendant may not be tried unless he can "understand the nature and object of the proceedings against him," "consult with counsel," and "assist in preparing his defense," and that he must be able to do so throughout the trial).[11] Where an accommodation such as an interpreter is necessary to assure that the individual can participate in and follow the proceedings, the Constitution mandates that the state provide it. See *United States ex rel. Negron* v. *New York*, 434 F.2d 386, 389-390 (2d Cir. 1970) (due process requires that non-English-speaking criminal defendant have the services of a foreign-language interpreter at trial).

The state may have a constitutional obligation to provide such accommodations even if doing so costs the state money. In this respect, this Court's line of cases requiring states to accommodate litigants' poverty in especially important proceedings is instructive. See, *e.g.*, *M.L.B.*, 519 U.S. at 124 (in case involving termination of mother's parental rights, state violated Fourteenth Amendment by dismissing mother's appeal because she could not afford to pay for a trial transcript); *Boddie* v. *Connecticut*, 401 U.S. 371, 380-81 (1971) (state law conditioning divorce decree on the parties' ability to pay court fees and costs violates Fourteenth Amendment); *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956) (Fourteenth Amendment prohibits state from conditioning direct appellate review of a criminal conviction on defendant's ability to purchase a

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[11] Although the cases cited in this paragraph involve criminal proceedings, a similar state obligation necessarily applies in especially important civil proceedings like those defining family relationships given the nature of the interest involved. See *M.L.B.*, 519 U.S. at 125; *id.* at 128-129 (Kennedy, J., concurring in the judgment); cf. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976) (process that is due depends, *inter alia*, on the strength of the private interest affected by official action).

trial transcript). These cases stand for the proposition that states have an affirmative obligation to facilitate participation in such important court proceedings by all individuals on equal terms, even if doing so means foregoing an important source of revenue—at least where doing so imposes no "undue burden on the State." *M.L.B.*, 519 U.S. at 122.

The application of Title II to a case like Popovich's directly enforces that principle. The statute provides that no qualified individual with a disability may "be excluded from participation in or be denied the benefits of" public services and activities like judicial proceedings. 42 U.S.C. § 12132. The Attorney General has interpreted that language to require states to "furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of," such services and activities. 28 C.F.R. § 35.160(b)(1).[12] Echoing the "undue burden" limitation in this Court's constitutional precedents, *M.L.B.*, 519 U.S. at 122, the relevant regulations make clear that states need not take any action that "would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.164. Title II's requirements here are thus extremely close to the requirements of the Constitution itself. As applied to a case like Popovich's, where the plaintiff sought an inexpensive accommodation that was necessary to permit him "to participate meaningfully in" the determination whether he would have custody of his daughter, *Popovich*, 276 F.3d at 815, Title II is clearly congruent and proportional to actual or threatened constitutional violations.

The second common fact pattern in Title II access-to-judicial-process cases involves courthouses that are physically inaccessible to individuals with mobility impairments. The widespread inaccessibility of courthouses throughout the nation was a major problem at the time the ADA was enacted, and the

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[12] The Attorney General's regulations were the product of notice-and-comment rulemaking pursuant to a specific grant of regulatory authority. See 42 U.S.C. § 12134(a). Accordingly, they are entitled to deference. *Chevron U.S.A. Inc.* v. *Echazabal*, 122 S. Ct. 2045, 2049, 2051-2052 (2002).

large number of post-enactment cases targeting inaccessible court facilities demonstrates that the problem persists.[13] Where inaccessible courthouses make it impossible for litigants with disabilities to participate effectively in their cases, the application of Title II will rest on much the same constitutional basis as underlies Popovich's case. See, *e.g.*, *Lane* v. *Tennessee*, 315 F.3d 680 (6th Cir. 2003) (affirming denial of motion to dismiss in Title II case brought by a criminal defendant arrested for two misdemeanors who alleged that he was forced to crawl up stairs to attend a hearing at an inaccessible courthouse). But even where the plaintiff has no similar constitutional interest in access to a particular trial, the state's operation of a court system that "when viewed in its entirety" is "not readily accessible to and usable by individuals with disabilities," 28 C.F.R. § 35.150(a), raises serious constitutional concerns. For such an inaccessible court system effectively closes off an important area of state government to an entire class of people defined solely by impairments that are not currently in their control. "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996). Application of Title II to assure access to courthouses is thus congruent and proportional to a potential violation of the Fourteenth Amendment.

3. *Elections*—In a number of cases, plaintiffs have challenged state voter qualifications or the accessibility of polling places under Title II. These applications are congruent and proportional to actual or threatened violations of the Equal Protection Clause. The right to vote "is a fundamental matter in a free and democratic society" because it is "preservative of other basic civil and political rights." *Reynolds* v. *Sims*, 377 U.S. 533, 561-62 (1964). As such, "'[o]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.'" *Bush* v.

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[13] See, *e.g.*, *Shotz* v. *Cates*, 256 F.3d 1077, 1080-1081 (11th Cir. 2001); *Layton* v. *Elder*, 143 F.3d 469, 472 (8th Cir. 1999); *Matthews* v. *Jefferson*, 29 F. Supp. 2d 525, 533-534 (W.D. Ark. 1998); *Kroll* v. *St. Charles County*, 766 F. Supp. 744, 752 (E.D. Mo. 1991).

Gore, 531 U.S. 98, 105 (2000) (quoting *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)).

The congressional findings accompanying the ADA list "voting" as one of the "critical areas" in which "discrimination against individuals with disabilities persists." 42 U.S.C. § 12101(a)(3). And at least two common fact patterns in this area implicate significant constitutional concerns. First, a qualified individual with a disability is surely denied the fundamental right to vote if he is denied a place to vote. Just as a voter's wealth "is not germane to one's ability to participate intelligently in the electoral process," *Harper*, 383 U.S. at 668, so too is a voter's ability to climb stairs or overcome other physical obstacles irrelevant to legitimate voting qualifications. Yet many Title II cases involve the denial of the vote to individuals with disabilities for no better reason than that they cannot overcome physical barriers that block access to polling places. See, *e.g.*, *New York* v. *County of Schoharie*, 82 F. Supp. 2d 19, 21, 25-26 (N.D.N.Y. 2000) (all of the county's 25 polling places were inaccessible, either in terms of parking, exterior pathways, the entrance to the building, or the interior of the building); *New York* v. *County of Delaware*, 82 F. Supp. 2d 12, 14 (N.D.N.Y. 2000) (all but one of 44 polling places were inaccessible); *see also New York* v. *County of Delaware*, 2000 WL 1264302 (N.D.N.Y Aug. 16, 2000) (noting that roughly half of the polling places in the counties of Delaware and Schoharie were still inaccessible six months after the initial decisions).[14] By requiring the removal of physical barriers to

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[14] Congress was well aware of this problem when it enacted the ADA. See, *e.g.*, S. Rep. No. 116, 101st Cong., 1st Sess. 12 (1989); *Americans with Disabilities Act of 1989: Hearings Before House Comm. on The Judiciary & Subcomm. on Civil & Const. Rights* 160 (1989) (statement of Laura Cooper); *Americans with Disabilities Act of 1989: Hearings Before Senate Comm. on Labor & Human Resources & Subcom. on the Handicapped* 663 (1989) (statement of Mary Lynn Jones); *Hearing On H.R. 2273, Americans with Disabilities Act of 1989: Hearing Before Subcom. on Select Educ. of House Comm. on Educ. & Labor* 65 (1989) (statement of Rick Edwards); 135 CONG. REC. S10793 (1989) (statement of Sen. Biden). Congress was also aware that the opportunity to cast an absentee ballot was no solution to this problem. Because absentee ballots typically must be cast well in advance of election day, an absentee option does nothing for the individual who discovers that his polling place is inaccessible for the first time when he goes to vote. It also

voting, see 28 C.F.R. § 35.149, Title II directly responds to state violations of individuals' fundamental constitutional right to vote.

It is irrelevant for these purposes that Title II may require states to incur some cost to eliminate those barriers.[15] Poll taxes, for example, may be a source of revenue that finances elections. See *Harper*, 383 U.S. at 674 (Black, J., dissenting). But states may not condition the franchise on the payment of those taxes, for the ability to pay one's way is irrelevant to legitimate voting qualifications. See *Harper*, 383 U.S. at 668. Cf. *Bullock* v. *Carter*, 405 U.S. 134, 147-148 (1972) (though candidate filing fees "serve to relieve the State treasury of the cost of conducting the primary elections," candidates may not be excluded on the basis of inability to pay such a fee, because "legitimate costs of the democratic process" should be borne by "the taxpayers generally"). To deny an individual with a disability the opportunity to vote because of the cost of retrofitting polling places built in an inaccessible manner similarly "introduce[s] a capricious or irrelevant factor" into the democratic process. *Harper*, 383 U.S. at 668.

The second common fact pattern involves formal disqualification of voters with disabilities. On many occasions states have denied people with mental disabilities the right to vote without engaging in the individualized examination of voting competence the Constitution requires. See *Doe* v. *Rowe*, 156 F. Supp. 2d 35, 51-56 (D. Maine 2001) (state constitutional provision disenfranchising persons under guardianship by reason of mental illness violates Fourteenth Amendment because not

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requires an individual with a disability to cast a ballot before the candidates have had a full opportunity to make their case to the voters. See S. Rep. No. 116, 101st Cong., 1st Sess. 12 (1989).

[15] The cost should not be overstated. Where existing facilities are concerned, relevant regulations require only that "the service, program, or activity, *when viewed in its entirety*, [be] readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). They do not "[n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a)(1). See also *Nelson* v. *Miller*, 950 F. Supp 201, 204-05 (W.D. Mich. 1996) (Title II requires access to ballot box, but not necessarily the means of voting preferred by an individual with a disability), aff'd, 170 F.3d 641 (6th Cir. 1999).

narrowly tailored to incompetent voters); *Manhattan State Citizens' Group, Inc.* v. *Bass*, 524 F. Supp. 1270, 1274-75 (S.D.N.Y. 1981) (state statute disenfranchising, *inter alia*, people involuntarily committed to hospitals or mental institutions violates Fourteenth Amendment as applied to those who had not been adjudged incompetent); see also *City of Cleburne*, 473 U.S. at 464 (Marshall, J., concurring in the judgment in part and dissenting in part) ("As of 1979, most States still categorically disqualified 'idiots' from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials."). By prohibiting discrimination against any "qualified individual with a disability," 42 U.S.C. § 12132—in the voting context, those individuals with disabilities who would satisfy an individualized determination of competence—Title II responds directly to this constitutional violation. See *Doe*, 156 F. Supp. 2d at 57-59 (finding Title II violation as well as constitutional violation).

4. *Unnecessary Institutionalization*—In *Olmstead* v. *L.C.*, 527 U.S. 581 (1999), this Court held that Title II in many cases prohibits the unnecessary institutionalization of people with disabilities. In particular, the Court held that the Attorney General's "integration regulation," which mandates that public services be administered "in the most integrated setting appropriate to the needs of qualified individuals with disabilities," 28 C.F.R. § 35.130(d), "require[s] placement of persons with mental disabilities in community settings rather than in institutions" under certain circumstances: "Such action is in order when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Olmstead*, 527 U.S. at 587. *Olmstead*'s application of Title II is congruent and proportional to actual and anticipated violations of the Fourteenth Amendment's Due Process Clause.

In *Youngberg* v. *Romeo*, 457 U.S. 307 (1982), this Court held that the Due Process Clause affords individuals confined in state institutions a qualified right to freedom from restraint. In particular, the state "may not restrain residents except when and to

the extent professional judgment deems this necessary to assure such safety [of residents and staff] or to provide needed training." *Id.* at 324. In determining whether the state has satisfied that duty, the Court held, the judgments of the state's treating professionals are entitled to substantial deference. "'[T]he Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.'" *Id.* at 321 (quoting *Romeo* v. *Youngberg*, 644 F.2d 147, 178 (3d Cir. 1980) (Seitz, C.J., concurring in the judgment)).

The plaintiff in *Youngberg* did not contend that his institutionalization *itself* constituted a professionally unjustified restraint; he focused on the state's imposition of additional restraints on him *during the course of* his institutionalization. See *id.* at 310. But the Court's prohibition on professionally unjustified restraint necessarily extends to the "'massive curtailment of liberty,'" *Vitek* v. *Jones*, 445 U.S. 480, 491 (1980) (quoting *Humphrey* v. *Cady*, 405 U.S. 504, 506 (1972)), inherent in the decision to keep an individual confined in an institution. A number of lower courts have thus found that states have violated *Youngberg*'s due process principles by disregarding the judgments of their own professionals and keeping individuals with disabilities confined in institutions. See, *e.g.*, *Thomas S.* v. *Morrow*, 781 F.2d 367, 374-375 (4th Cir.) (upholding, as proper application of *Youngberg*, district court order mandating, in accordance with the determination of the state's own professionals that treatment in an institutionalized setting was inappropriate, that state place plaintiff in a community treatment setting), cert. denied, 476 U.S. 1124, 479 U.S. 869 (1986); *Clark* v. *Cohen*, 794 F.2d 79, 87 (3d Cir.) (finding *Youngberg* violation where plaintiff was confined to an institution "rather than released to a CLA [community living arrangement], and was deprived of the training for community living that she could have received at a CLA, despite professional judgment, unanimous since 1976, that she should be released from [the institution] and receive such training"), cert. denied, 479 U.S. 962 (1986); *Thomas S.* v. *Flaherty*, 902 F.2d 250, 252, 254 (4th Cir.) (similar holding in class action phase of the *Thomas S.* case), cert. denied, 498 U.S. 951 (1990).

Title II's integration mandate, as interpreted in *Olmstead*, is thus extremely similar to the due process requirements imposed by *Youngberg*. Where *Youngberg* accords a "presumption of correctness" to the decisions of treating professionals, *Youngberg*, 457 U.S. at 324, *Olmstead* makes clear that "the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community-based program," *Olmstead*, 527 U.S. at 602. And the state's "fundamental alteration" defense, see *Olmstead*, 527 U.S. at 603-606 (plurality opinion), responds directly to *Youngberg*'s statement that due process jurisprudence must weigh individual liberty interests "against legitimate state interests and in light of the constraints under which most state institutions necessarily operate," *Youngberg*, 457 U.S. at 324.

To be sure, the integration mandate as interpreted in *Olmstead* is not identical to the due process principles announced in *Youngberg*. Compare *Olmstead*, 527 U.S. at 602 (providing that the state's professionals are entitled to deference only "generally," and only when their assessments are "reasonable"), with *Youngberg*, 457 U.S. at 323 (requiring deference to state professionals unless their judgments reflect "a *substantial* departure from accepted professional judgment") (emphasis added). Title II's integration mandate thus requires of states somewhat more than the Due Process Clause requires of its own force. But the statute's somewhat broader coverage simply serves to deter and remedy violations of *Youngberg*'s due process requirements—violations of which a substantial record existed at the time Congress adopted the ADA. See *Kimel*, 528 U.S. at 81 (recognizing Congress's power to adopt prophylactic legislation that deters and remedies constitutional violations); *Boerne*, 521 U.S. at 518 (same).

At the time the ADA was adopted, Congress could reasonably have seen a prohibition on unnecessary institutionalization as responding to actual or potential due process violations in two ways: first, by giving a remedy to individuals for whom institutionalization was professionally unjustified and thus unconstitutional under *Youngberg*; and second, by giving a remedy to those individuals whose institutionalization was initially proper

but who experienced unconstitutional conditions of confinement. Congress was well aware that professionally unjustified institutionalization of people with disabilities was widespread. The ADA's statutory findings state that segregation of individuals with disabilities is "a serious and pervasive social problem" and that discrimination "persists in such critical areas as . . . institutionalization." 42 U.S.C. § 12101(a)(2), (3). One source for these findings, a 1983 report of the United States Commission on Civil Rights, discussed the problem extensively. See U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 32-35 (1983). The report described "the systematic placement of handicapped people in substandard residential facilities"; noted the evolving professional consensus that "most training, treatment, and habilitation services can be better provided to handicapped people in small, community-based facilities"; yet concluded that "a great many handicapped persons remain in segregative facilities." *Ibid.* Cases like *Thomas S.* and *Clark* provided "confirming judicial documentation," *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring), that the widespread practice of unnecessary institutionalization likely violated the Constitution. And numerous other cases found that the *conditions* at particular institutions violated the Due Process Clause; many of these cases resulted in remedial decrees ordering that individuals be moved from institutional to community placements as the most effective remedy for those conditions. See, *e.g.*, ROBERT M. LEVY & LEONARD S. RUBENSTEIN, THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES 226-228 (1996) (collecting cases). Against this backdrop, Title II's integration mandate, to the extent it goes further than the Constitution at all, represents just the sort of mild prophylaxis that this Court has previously endorsed.

II. As Applied To The Parties And Circumstances Of This Case, Title II Is A Proper Exercise Of Congress's Section 5 Authority

Because neither Section 12202's abrogation of state sovereign immunity nor Title II's prohibition on discrimination is unconstitutional on its face, the only question properly before this Court is the question whether Section 12202's abrogation of state

sovereign immunity is valid as applied to *this* Title II case. We agree with respondent that the abrogation is valid as applied here.

Because our principal concern is with the Court's choice between a facial and an as-applied analysis, we make no effort to describe comprehensively the argument for upholding the abrogation of state sovereign immunity here. For that we refer the Court to the respondent's brief and the other *amicus* briefs. We focus here on one key aspect of this case that makes Title II, as applied here, clearly congruent and proportional to a violation of the Fourteenth Amendment: Respondent's complaint, fairly read, alleges that the decision to deny his license application "rest[ed] on an irrational prejudice against" people with mental illness. *Cleburne*, 473 U.S. at 450. At least at the pleading stage, then, this case must be treated as one that challenges state conduct that itself violates the Fourteenth Amendment. See *ibid.* (decision that rests on such irrational prejudice violates the Equal Protection Clause even under rational basis scrutiny).

Two procedural facts are of crucial importance here. First, respondent filed his complaint *pro se*. Second, the district court dismissed this case on the pleadings. "It is settled law that the allegations of [a *pro se*] complaint, 'however inartfully pleaded,' are held 'to less stringent standards than formal pleadings drafted by lawyers . . . .'" *Hughes* v. *Rowe*, 449 U.S. 5, 9 (1980) (*per curiam*) (quoting *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972) (*per curiam*); ellipses in *Hughes*). And even a counseled complaint can be dismissed only if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

Although respondent's complaint is hardly a model of clarity, it contains numerous allegations which "can fairly be construed," *Village of Willowbrook* v. *Olech*, 528 U.S. 562, 565 (2000) (*per curiam*), as alleging that petitioner rejected his application because of an irrational prejudice against people with a history of mental illness. For example, the complaint avers that petitioner ignored evidence of respondent's fitness to practice medicine, and that petitioner did so out of "bias and invidious discriminatory inclinations"—including "invidious subjective

discriminatory biases against" respondent for, among other things "having had a history of depression." Pet. App. 47-48. The complaint appears to allege that because of those biases, petitioner took acts—including numerous procedural irregularities in the licensing proceedings, see Pet. App. 41-43—"calculated to make *anyone with a history of mental illness* and/or Dr. Hason particularly . . . look as if they were unsafe and that no reasonable accommodation or agreement or adjustment could make them safe." Pet. App. 50 (emphasis added).

The mere denial of accommodation to a license applicant would not in itself demonstrate that the state acted arbitrarily and irrationally. See *Garrett*, 531 U.S. at 367. But the outright rejection of "anyone with a history of mental illness," Pet. App. 50, based on "invidious subjective discriminatory biases," Pet. App. 48, certainly would. For such an exclusion would reflect something more than simply "'negative attitudes' or 'fear.'" *Garrett*, 531 U.S. at 367 (rejecting proposition that decisions based on negative attitudes or fear "necessarily run[] afoul of the Fourteenth Amendment"). It would reflect sheer "prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *Cleburne*, 473 U.S. at 440. When an entity like a state licensing board generally gives individualized consideration to applicants' qualifications but pretermits that individualized process in a particular case simply because of prejudice against an applicant with a disability and for no rational reason, *Cleburne* makes clear that an equal protection violation has occurred. See *id.* at 448. Because respondent's complaint, fairly read, alleges just such an equal protection violation, the application of Title II and the statutory abrogation provision to his case is congruent and proportional to an actual violation of the Fourteenth Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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